

Covid- 19: Malaysia and the Return of Rule by Law

Ratna Rueban Balasubramaniam

2020-05-16T10:19:59

The first case of Covid-19 in Malaysia was first confirmed on January 25, 2020 with three Chinese nationals who arrived from Wuhan in Malaysia via Singapore. Yet it wasn't until a religious gathering from February 27 to March 1 with over 16,000 people attending that community transmission in Malaysia became widespread. As of May 13, Malaysia has reported [6,779 confirmed cases, 1,709 active cases, 5113 recoveries and 109 deaths.](#)

From “new” Malaysia back to “old” Malaysia?

Two simultaneous narratives are unfolding as Malaysia responds to Covid-19. The first and my main focus is the specific character of the ongoing legal response. The second is salient backdrop to any evaluation of this legal response that Malaysia is in political turmoil. In March, the government led by the Pakatan Harapan (“PH”) collapsed. PH won the 2018 elections with a historic result defeating the United Malay National Organization (“UMNO”). UMNO had helmed government for six decades and was authoritarian, corrupt, and incompetent. However, a major international scandal (“1MDB”) where billions of dollars were stolen allegedly by the former Prime Minister Najib Razak and his cronies from a national state fund brought down the regime, ushering an era of democratic change dubbed the “[new Malaysia](#)”. Unfortunately, a series of political machinations caused PH to collapse. A new coalition called the Perikatan Nasional (PN”) comprising mainly UMNO and the Parti Islam Malaysia (“PAS”) emerged to form a government and was appointed government by the *Yang di-Pertuan Agong*, i.e. the King. Parliament remains prorogued until May 18th when the PN government may face a vote of confidence.

When UMNO was in power, it practiced “[rule by law](#)”. While the rule of law is commonly distinguished from arbitrary power, rule by law involves the use of the legal form, especially legislation, as a cloak for arbitrary power. In Malaysia, rule by law typically involves the use of legislation to grant public officials wide discretion that is immunized from judicial oversight using legislative ouster clauses that limit or exclude judicial review. To operationalize this approach, the UMNO government tightly controlled Parliament and undermined judicial review giving rise to an executive-dictatorship. Executive-minded judges would treat any intimation by a public official that a decision complies with the law as sufficient to confirm the legal legitimacy of that decision. The purpose of rule by law was to project an aura of legitimacy when in fact exercising legally uncontrolled and arbitrary power, making law an instrument used to dominate legal subjects and to pursue authoritarian rule. With UMNO back in power, rule by law is likely to return.

Constitutional carte blanche

So far, the PN government has not utilized emergency powers under Article 150 of the Malaysian [Constitution](#). The provision grants the King authority to proclaim a state of emergency if he is satisfied that there is a serious threat to “security”, “economic life”, or “public order”. Since by convention the King acts on the advice of the Prime Minister, in practice these powers accrue to the ruling government. If, as is the case now, Parliament is not sitting during the emergency, the King can rule by issuing decrees which may derogate from constitutional limits on state power, including limits in the constitutional bill of rights. Significantly, the King’s subjective judgment that there is an emergency and decisions about how to respond to that emergency are immune from judicial review. Article 150 thus effectively grants a blank cheque to the government to undermine fundamental liberties in the exercise of emergency rule.

Instead, the response to Covid-19 has been governed by ordinary legislation, principally *The Prevention and Control of Diseases Act 1988* (“PCDA 1988”). The effect of the PCDA 1988 is to put the Director General of Health (“the Director”) in [charge](#). The Director is empowered to create new regulations and offences enforceable with the assistance of the police in response to the threat. Hence, on March 20th, a Movement Control Order (“MCO”) was issued. The MCO prevents people from leaving home save for essential purposes like acquiring food or medicine; bans public gatherings; orders the closure of most government institutions, educational institutions, and businesses; seals Malaysia’s international border and bans inter-state travel. In areas with a concentrated cluster of Covid-19, an Enhanced MCO applied with stricter limits on movement. Violators are subject to a fine of RM1, 000 or six-months imprisonment. The police and the military were brought in to help enforce the MCO.

Presently, daily infections and death rates have dropped sufficiently for the government to downgrade to a Conditional MCO that allows greater movement and for some institutions and businesses to [reopen](#). However, more stringent versions of the MCO remain in areas where infection rates remain undesirable.

The National Security Council – Adviser with virtually unfettered powers

The legal response following the PCDA 1988 has been relatively reasonable and effective with authorities generally acting conscientiously to safeguard public health. However, the risk of rule by law remains because the National Security Council (“NSC”) is also advising the government. The NSC is chaired by the Prime Minister and comprises three Ministers, including the Minister of Defence and Foreign Affairs, as well as the Chief of Defence and the Chief of Police. The NSC draws authority from the National Security Council Act 2016 (“NSCA [2016](#)”). The NSCA 2016 allows the Prime Minister on the advice of the NSC to declare a “national security area” – an area that is “seriously disturbed or threatened by a person, matter or thing

which is likely to cause serious harm to the people, or serious harm to the territories, economy, national key infrastructure of Malaysia or any other interest of Malaysia, and requires immediate national response”. Any such declaration is valid for six months but is subject to indefinite renewals. Within a national security area the NSC has power

“to do all things necessary or expedient...notwithstanding any other written law, including controlling and coordinating government entities with respect to national security operations and issuing directives to such entities on matters concerning national security”.

Using this power, the NSC can then authorize security forces to detain without warrant, seize property, and to impose curfews at will. Again, any decisions taken under the authority of the NSCA 2016 are immune from judicial review. To the extent that there may remain textual hooks in the legislation for such review, Malaysian courts are notoriously deferential towards government in cases of national security, where such deference even is more likely given doubts about the independence of the Malaysian [judiciary](#).

The NSCA 2016 is deeply problematic. It makes hash of the separation of powers by centralizing almost total power in the hands of the NSC and encourages an official mindset that inclines towards arbitrary power. Here one should not underestimate how institutional design shapes the role morality of [officials](#). Therefore, even if there is presently no clear evidence that the PN government wishes to use the vast powers under the NSCA 2016, any involvement of the NSC in the official response to Covid-19 is therefore potentially problematic because the tendency of the NSC will be towards arbitrary and authoritarian decision-making.

There are signs of this problem beginning to arise. For instance, the newly minted Minister of Defence stated that the NSC has the sole authority to issue directives, despite the PDPA 1988 giving such authority to the Director General of [Health](#). It appears that the NSC is asserting a greater role in determining the response to Covid-19. Here the involvement of the military in assisting with the enforcement of the MCO is revealing since military involvement requires a declaration that an area is a security area under the NSCA 2016. Thus far there has not been any such declaration. Hence, it would seem that the NSC is acting in a way that goes beyond its legal remit.

Again, that the NSC would do so is unsurprising given that the NSCA 2016 eviscerates the principle of the separation of powers by concentrating power solely in its hands. Hence, an official acting in the name of the NSCA 2016 will conceive of his role in a way that is not limited by jurisdictional limits, opening the door to authoritarian impulses. Such impulses are on display when the Minister of Defence also warned that those who misreport the government’s response to Covid-19 would face stern [action](#). The context for the warning was a report about the rounding up of undocumented migrants and their treatment, which imperiled their health and safety. Indeed, the report eventually made international [headlines](#). In reaction, the police called in two local journalists for potential violation of the Penal Code to determine if they had committed “intentional insult with the intent to provoke a breach” of public

[peace](#). No charges were brought but the journalists were harassed for exercising their democratic and constitutional right to free speech. Of course, the harassment of journalists who criticize the government was also characteristic of authoritarian rule under the previous UMNO [regime](#).

Judicial Independence in question

In addition, there are depressing signs that the courts are not being impartial in dealing with those linked to the PN government. When the daughter of the present head of UMNO, Zahid Hamidi (who is also being investigated for corruption), was charged for violating the MCO, she was punished with a relatively light [fine](#). The decision invited backlash because ordinary citizens had to pay heftier fines or had been sentenced to [jail](#). While hers is but one case, it is revealing that former Prime Minister Najib Razak, who is being prosecuted for offences related to 1MDB, let slip he will sue his critics once his cases are "[settled](#)". The impression is that those linked to the PN government are above the law.

Democracy and the rule of law as victims of Covid-19

There are also troubling indications that the rot of corruption in government is returning. Principled individuals appointed by the PH government to facilitate democratic reform have been sacked or have [resigned](#). Unqualified appointees have been given positions of authority in government and others handed plum positions in Government-linked [Corporations](#). While Covid-19 blazes on, ruling elites associated with PN are realigning and taking control of the state-capitalist structure to conserve their position.

When Parliament reconvenes on May 18, the PN government could face a vote of confidence. The indications so far are that any legislative proceeding will be very brief and the focus will be on how to respond to Covid-19. If PN loses the vote, the King could in theory appoint PH as the new government with proof that it commands a majority. Or, there could be a snap election. However, my general sense is that people have no appetite for another change in [government](#) and would prefer a steady hand in government to manage the ongoing health emergency triggered by Covid-19. Indeed, there is some talk of a July sitting of Parliament where a wider package of legislative initiatives (the details of which remain undisclosed) will be mooted. Therefore, if there is a vote of confidence and PN survives, I suspect that PN will consolidate its position thereby marking the progressive return of rule by law and authoritarian politics. Paradoxically, if PN continues to successfully mitigate the threat posed by Covid-19, this success may be enough to overcome the perception that it is an illegitimate "[backdoor](#)" government. But the result-cherished ideals of political morality will be among the many victims of Covid-19 – democracy, the rule of law, and respect for fundamental human rights.